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No. (D)

In The
Supreme Court of the United States

EMORY ZIPPERER,
Petitioner,

v.

RAYTHEON COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

THERESA FINN DEVER
JOSEPH P. DEVER
FREDERICK W. RILEY
Counsel of Record
RILEY & DEVER, P.C.
LYNNFIELD WOODS OFFICE PARK
210 BROADWAY, SUITE 101
LYNNFIELD, MA 01940-2351
TELEPHONE: (781) 581-9880

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Under what circumstances are a former employee's state law claims against a former employer for negligent recordkeeping and resulting compensatory damages preempted by ERISA where the former employee is induced to retire early from his job at a subsequent employer upon receiving an overstated pension benefit estimate from his former employer's pension benefit administrator which, in turn, had received erroneous information concerning the former employee's dates of service with the former employer, its subsidiaries and affiliates?

LIST OF PARTIES

The parties to this proceeding include Emory Zipperer, a private individual, and Raytheon Company, Inc., a corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

INTRODUCTORY PRAYER 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION ... 5

I. Since The Enactment of ERISA The Supreme Court's Interpretation of the "Relates to" Clause in Section 514 of the Statute Has Continued To Evolve From A Textualist, Common Sense Analysis To A More Pragmatic Field/Conflict Analysis ... 5

A. Textualist Analysis 7

B. The Emergence Of Criticism Of The Textualist Approach And The Movement Toward The Pragmatic Field/Conflict Analysis 11

C. In Addition To Justice Stevens, Justices Scalia, Ginsburg and Breyer Have All Criticized The Textualist Approach And Recommended Field And Conflict Preemption Analysis 15

D. In *Aetna Health v. Davila*, 542 U.S. 200, 209 (2004), The Supreme Court Determined That The Aggrieved Parties' Claims Duplicated, Supplemented or Supplanted An ERISA Civil Enforcement Remedy And, Therefore, Were Preempted by ERISA 21

II. The First Circuit Court of Appeals Relied Exclusively On The Textualist Approach And Did Not Use The Pragmatic Conflict and Field Preemption Analysis Called For By More Recent Supreme Court Decisions 24

CONCLUSION 30

APPENDIX

Appendix A- *Zipperer v. Raytheon Company, Inc.*, 493 F.3d 50 (1st Cir. 2007) 1a

Appendix B-*Zipperer v. Raytheon Company, Inc.*, Memorandum Opinion and Order of the United States District Court for the District of Massachusetts (D. Mass. March 30, 2006) .. 11a

Appendix C-*Zipperer v. Raytheon Company, Inc.*, Report and Recommendation (Magistrate Justice, July 6, 2005) 14

TABLE OF AUTHORITIES

Cases

Aetna Health, Inc. v. Davila,
542 U.S. 200 (2004) 21, 22, 23, 24, 25, 27

Boggs v. Boggs,
520 U.S. 833 (1997) 17, 18

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,
519 U.S. 316 (1997) 6, 15, 16, 17, 18, 19, 20

De Buono v. NYSA-ILA Medical and Clinical Services Fund,
520 U.S. 806 (1991) 18

District of Columbia v. The Greater Washington Board of Trade,
506 U.S. 125 (1992) 11, 12, 13

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 18, 19, 20, 21

Ingersoll v. Rand Co.,
498 U.S. 133 (1990) 10, 11, 24

Metropolitan Life Insurance Company v. Taylor,
481 U.S. 58 (1987) 9, 10

Metropolitan Life Insurance Company v. Travelers Insurance Company,
471 U.S. 724 (1985) 8

Nachtman Corp. v. Pension Benefit Guaranty Corp.,
446 U.S. 359 (1980) 5

New York State Conf. Of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) ... 13, 14, 15, 18, 19, 24, 25

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,
461 U.S. 190 (1983) 17

Pegram v. Herdrich,
530 U.S. 211 (2000) 18

Pilot Life Insurance Co. v. Dedeaux,
481 U.S. 41 (1987) 8, 9

Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 7

Shaw v. Delta Airlines, Inc.,
463 U.S. 85 (1983) 7, 8, 12, 13, 19

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 16, 17

Statutes

28 U.S.C. §1254(1) 1

29 U.S.C. §1132(a)(1)(B) 9, 23

29 U.S.C. §1140 11

29 U.S.C. §1144(a) 2, 6, 12

Mass.Gen.L.ch.149, § 52C 28

Legislative Documents

120 Cong. Rec. 29197 (1974) 13

INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 12, 2007.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit, issued on July 12, 2007, is officially reported at 493 F.3d 50 and has been included in the appendix on pages 1a-10a. The Memorandum Opinion and Order of the United States District Court for the District of Massachusetts, dated March 30, 2006, has been included in the appendix on pages 11a-13a. Magistrate Justice Marianne B. Bowler filed a Report and Recommendation dated July 6, 2005, allowing Raytheon's motion for judgment on the pleadings and has been included in the appendix on pages 14a-28a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on July 12, 2007. On September 28, 2007, Justice Souter granted Petitioner's Application For Extension Of Time To File Petition For Writ Of Certiorari extending until December 9, 2007, the time in which the Petition For Writ of Certiorari must be filed. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The focal point of the Petition is the phrase "relate to" as set forth in 29 U.S.C.A. § 1144(a). Specifically, Section 514(a) of the Employment Retirement Income Security Act of 1974, 29 U.S.C.A. § 1144(a) provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

STATEMENT OF THE CASE

Petitioner Emory Zipperer ("Zipperer") was a long-term employee of Respondent Raytheon Company, Inc. ("Raytheon") and various of its subsidiaries and affiliates. After leaving the employment of Raytheon and while working for Washington Group International ("WGI"), Zipperer and his wife Mary decided to explore the feasibility of Zipperer's early retirement. Zipperer sought and received an estimate from Raytheon's pension benefit administrator, the Raytheon Benefits Center, concerning the pension he would receive from Raytheon upon his early retirement. Based on this estimate, Zipperer and his wife both retired from their respective jobs, sold their home and purchased a mobile home in which they planned to travel across the United States. Approximately, two years into his retirement, Zipperer received a letter from the Raytheon Benefits Center informing him that an error had been made and that, in essence, his monthly pension benefit would be cut in half. Moreover, Zipperer was informed that he needed to repay Raytheon for overpayments previously made to him. The Raytheon Benefits Center explained that it had been given erroneous data by Raytheon

concerning Zipperer's dates of service with Raytheon, and its various subsidiaries and affiliates.

After exhausting his internal appeals, on or about November 13, 2003, Zipperer filed an action for negligence, equitable estoppel, and negligent misrepresentation against Raytheon in state court in Massachusetts, alleging, *inter alia*, that Raytheon's failure to maintain proper corporate records concerning Zipperer's employment resulted in Raytheon providing incorrect data to the Raytheon Benefits Center which resulted in the Center's providing incorrect data and information to Zipperer concerning his retirement benefits. In his Complaint, Zipperer sought compensatory damages flowing from Raytheon's negligent recordkeeping and reporting of incorrect information to the Raytheon Benefit Center that, in turn, led to him receiving incorrect information from the Raytheon Benefit Center that reasonably induced him and his wife to retire early. Specifically, Zipperer's prayers for relief included damages for his present lost wages, lost benefits, future income and attorneys' fees and costs. Zipperer calculated his damages based upon the position he gave up at WGI, including his lost wages, lost benefits and future income. Importantly, Zipperer made no claim against Raytheon or the Raytheon Benefits Center for reinstatement of his pension benefits or any other relief based on the plan.

On or about November 25, 2003, Raytheon removed the case to the District Court for the District of Massachusetts.

On or about March 1, 2005, Raytheon moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure contending that Zipperer's claims for negligence, equitable estoppel and negligent misrepresentation were preempted by ERISA, the Employee Retirement Income Security Act of 1974 ("ERISA"), and further, that Zipperer could not assert any cognizable claim for damages should his complaint be construed to include an ERISA claim. Zipperer opposed Raytheon's motion on the grounds that his claims were not preempted by ERISA.

On July 6, 2005, the District Court of Massachusetts, by Magistrate Justice Marianne B. Bowler, filed a Report and Recommendation allowing Raytheon's motion for judgment on the pleadings. Zipperer filed objections to the Report and Recommendations. Raytheon filed a reply to such objections. On March 30, 2006, the District Court of Massachusetts (Wolf, J.), entered an order allowing Defendant's Motion For Judgment On The Pleadings. The District Court further granted Zipperer, subject to Federal Rule of Civil Procedure 11, leave to amend his complaint to set forth a claim under ERISA. Zipperer did not file an amended complaint. On August 9, 2006, the court ordered judgment entered in favor of Defendant Raytheon. On September 7, 2006, Zipperer filed a notice of appeal. On July 12, 2007, the First Circuit Court of Appeals affirmed the lower court's determination that Zipperer's claims for negligence, equitable estoppel and negligent misrepresentation were preempted by ERISA.

REASONS FOR GRANTING THE PETITION

I. Since The Enactment of ERISA The Supreme Court's Interpretation of the "Relates to" Clause in Section 514 of the Statute Has Continued To Evolve From A Textualist, Common Sense Analysis To A More Pragmatic Field/Conflict Analysis.

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* Heralded as groundbreaking legislation, ERISA sought to ensure that "if a worker had been promised a defined pension benefit upon retirement-and if he has fulfilled whatever conditions are required to obtain a vested benefit...he actually receives it." *Nachtman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Soon after its enactment, however, ERISA's early glow dimmed as it became evident that its ambiguities would result in a large number of appellate decisions attempting to shed light on the areas left in the dark by Congress.

For more than twenty-five years, the United States Supreme Court has labored to address the glaring deficiencies in the statutory scheme. Much of the ERISA jurisprudence has focused on ambiguities in three areas: (1) the savings clause, (2) the deemer clause, and (3) the phrase "relate to" contained in the preemption provision of Section 514(a).

Zipperer's petition for writ of certiorari should be granted to provide and adopt a clear test to determine whether a State law or cause of action is preempted by ERISA. Section 514(a) provides that ERISA preempts

"any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." History has demonstrated that a textualist approach to interpreting the phrase "relate to" as set forth in 29 U.S.C.A. § 1144(a) has failed to resolve the conflict. Justices of this Court have opined that the textualist approach intensifies the murkiness rather than clarifies the ERISA preemption statute. As stated by Justice Scalia, "[a]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316, 335 (Scalia, J., concurring).

The deficiencies apparent in using the textualist analysis approach resulted in various attempts by the Supreme Court to clarify precisely when and under what circumstances ERISA's preemption axe should fall. A review of this Court's case law since the enactment of ERISA reveals that the Supreme Court's ERISA preemption analysis has evolved from its initial textualist approach to a more nuanced pragmatic approach. Several of this Court's Justices have expressed dissatisfaction with the current state of the law concerning ERISA preemption and as a result many of the cases handed down are accompanied by occurrences and dissents that call for the adoption of different standards more in line with this Court's traditional field and conflict preemption analysis. As described below, the resulting confusion is readily apparent in the First Circuit's opinion in Respondent Zipperer's case, where that court made reference to some of the Supreme Court's evolving ERISA

preemption case, however, in the end, merely applied the outdated "relates to," textualist standard.

A. Textualist Analysis

Initially, the earliest Supreme Court cases addressing ERISA preemption were easily resolved because a clear statutory conflict was present. In *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 (1981), the United States Supreme Court merely affirmed the Third Circuit Court of Appeal's determination that a New Jersey worker's compensation law eliminating a method for calculating pension benefits permitted under ERISA is preempted by ERISA. The Court remarked, "[w]e need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." *Id.* at 525.

In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 (1983), the United States Supreme Court extolled the long arm of the "relate to" provision by stating, "the breadth of §514(a)'s pre-emptive language is apparent from that section's language." In its opinion, the United States Supreme Court adopted the textualist or plain meaning approach to interpret the "relate to" language. *Id.* The Court concluded, "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97, and n. 16, citing Black's Law Dictionary 1158 (5th ed. 1979). In footnote 16, the Supreme Court cited Black's Law Dictionary's definition of "relate" as "[t]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"). *Id.* Applying

this definition, the Supreme Court determined that New York's Human Rights Law prohibiting "employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly 'relate to' benefits plans." *Id.* The Supreme Court determined that the plain language approach should be used "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Id.* at 97. Also, in a footnote in *Shaw v. Delta Airlines, Inc.*, the Supreme Court explained that, "[s]ome state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100, n. 21. Two years after its decision in *Shaw v. Delta Airlines, Inc.*, the Supreme Court continued the plain language reading of "relate to" in *Metropolitan Life Insurance Company v. Travelers Insurance Company*, 471 U.S. 724, 739 (1985).

In a line of cases involving the insurance savings clause, the United States Supreme Court has been careful to follow strictly the wording of the so-called "deemer" clause and only exempt from ERISA preemption, claims that relate to laws regulating insurance. For example, in *Pilot Life Insurance Co. v. Dedeaux*, an employee filed claims of breach of contract and breach of fiduciary duty against an insurance company that administered his employer's long term disability benefit plan. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 43 (1987). Plaintiff Everate W. Dedeaux claimed that the long term disability insurance carrier had improperly terminated his

disability benefits. *Id.* Through his lawsuit, Dedeaux sought damages for the insurance carrier's failure to provide benefits under the insurance plan, consequential damages and emotional distress damages. *Id.* Pilot Life Insurance Co., the insurance carrier, argued that Dedeaux's claims were preempted by ERISA. *Id.* The United States Supreme Court advocated a "common-sense" approach to the interpretation of "relate to." *Id.* In particular, the United States Supreme Court analyzed the type of relief sought by Dedeaux and whether the ERISA statute provided an avenue for similar relief. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 48. The United States Supreme Court held that as Dedeaux, a plan beneficiary, sought benefits accrued under the plan's disability insurance policy, his claim was preempted by ERISA which, in its civil enforcement provision, § 502(a), would have afforded him the same type of relief. *Id.* at 57.[1] Accordingly, Dedeaux's claims were preempted by ERISA. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 57.

Similarly, in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58, 62 (1987), an employee's claims for damages flowing from the denial of his worker's

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[1] ERISA § 502(a)(1)(B) provides that

> A civil action may be brought (1) by a participant or beneficiary-..(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B).

compensation benefits were preempted as he sought damages directly related to the worker's compensation plan. *Id.* In other words, the employee was seeking actual benefits under a benefit plan. As such, the United States Supreme Court determined that the employee's claims were not exempted from ERISA preemption on the basis of the insurance savings clause as the claims did not relate to a law regulating insurance. *Id.*

Into the next decade, the Supreme Court continued to refine its definition of the phrase "relate to" in the ERISA preemption clause. In *Ingersoll v. Rand Co.*, 498 U.S. 133, 140 (1990), the United States Supreme Court found preemption of a former employee's claims against his employer for wrongful termination based upon his employer's wish to avoid making contributions to the employee's pension fund. The Supreme Court for the first time went beyond its traditional plain meaning, common sense approach and focused its preemption inquiry on two factors. First, a cause of action is preempted by ERISA if "the court's inquiry must be directed to the plan." *Id.* Second, a cause of action is preempted if it "conflicts directly with ERISA." *Id.* at 142. In *Ingersoll*, the Supreme Court determined the lower court's inquiry would have been directed to the plan as the lower court would have had to consult the company's pension plan, its terms and vesting schedule to determine whether "the employer had a pension-defeating motive in terminating his employment." *Id.* at 140. In its decision, the Supreme Court remarked that "this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself." *Id.* at 140 (emphasis original). Second, the Supreme Court

determined that the employee's cause of action conflicted directly with an ERISA cause of action as Section 510 of ERISA provides that a person should not be terminated "*for the purpose of interfering with attainment of any right to which such participant may become entitled* under the plan." *Id.* at 142-143, quoting 29 U.S.C. § 1140 (emphasis original).

B. The Emergence Of Criticism Of The Textualist Approach And The Movement Toward The Pragmatic Field/Conflict Analysis

In *District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. 125, 132-133 (1992), the Supreme Court ruled that a District of Columbia provision requiring employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible to receive worker's compensation benefits was preempted by ERISA. Justice Stevens, in his dissent, launched the first all out attack upon the plain, common sense reading of the words "relate to." *District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. at 135 (1992) (Stevens, J., dissenting). In that case, Justice Stevens also observed that until the *District of Columbia* ruling, a broad reading of the "relate to" phrase had "not been necessary to support any of this Court's actual holdings." *Id.* Justice Stevens also seemed concerned that a broad reading of the "relate to" in the decision would have far reaching implications in the lives of working people. *Id.* at 133.

In his dissent, Justice Stevens aptly observed that the so called ERISA preemption provision set forth in 29 U.S.C. 1144(a) does not even use the words preempt. *Id.* at 136. Instead, 29 U.S.C. 1144(a) provides that ERISA shall "*supersede* any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.* Justice Stevens continued that if the Court were to decide the case based on nothing more than a plain reading of the ERISA statute itself, it would conclude that there was no preemption or suppression of the District of Columbia law as such relates to a subject unregulated by ERISA. *Id.* Justice Stevens suggested using a field preemption and conflict preemption analysis to decide the ultimate issue. Field preemption occurs when "federal law so thoroughly occupies a legislative field'" that State law cannot coexist. Conflict preemption is found were a state law "actually conflicts with federal law." *Id.* at 136 (citations omitted).

In sum, Justice Stevens cautioned against, "mechanically repeating earlier dictionary definitions of the word 'relate' as its only guide in an important and difficult area of statutory construction." *Id.* at 138. Instead, Justice Stevens wrote that "the Court should pause to consider, first, the wisdom of the basic rule disfavoring federal pre-emption of state laws, and, second, the specific concerns identified in the legislative history as the basis for federal pre-emption." *Id.* Justice Stevens then cited the legislative history of ERISA as quoted in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 (1983). Representative Dent, one of the sponsors of the bill establishing ERISA debated the preemption provision in Congress stating, "[f]inally, I wish to make note of what is to

many the crowning achievement of this legislation, the reservation of Federal authority the sole power to regulate the *field* of employee benefits plans. *Id.* at 99 (citations omitted) (emphasis supplied). Congressman Dent continued, "[w]ith the preemption of the *field*, we round out the protection afforded participants by elimination of the threat of conflicting and inconsistent State and local regulation." *Id.* at 99 (emphasis supplied), quoting 120 Cong. Rec. 29197 (1974). Justice Stevens, in his dissent, opined that the District of Columbia law did not "regulate even one inch of the pre-empted field," and further "poses no threat whatsoever of conflicting and inconsistent state regulation." *District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. at 137.

Following Justice Stevens' *District of Columbia* dissent, the United States Supreme Court provided further guidance aimed at curtailing the breadth of the phrase "relating to" an employment benefit plan as contained in ERISA. Remarking that although the text of ERISA's preemption is "clearly expansive," the United States Supreme Court, in *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), cautioned that the "relate to" provision set forth in § 514(a) must not be interpreted to "extend to the furthest stretch of its indeterminancy, [or] for all practical purposes preemption would never run its course, for '[r]eally, universally, relations stop nowhere.'"

The Court went on to instruct that the Supremacy Clause of the United States Constitution "may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and

state law." *Id.* at 654. Recognizing the need for balance between state and federal regulation, the Supreme Court has "addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *Id.* In particular, the Supreme Court explained that in cases where "federal law is said to bar actions in fields of traditional state regulation...we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 655. (citations omitted). The Supreme Court further instructed that in examining the statutory construction of a Federal law, the Supreme Court first reviews "the text of the provision in question, and moves on, as need be, to the structure and purpose of the Act in which it occurs." *Id.*

Applying such analytical scheme to the facts of the case of *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, the Supreme Court stated that it was clear that a New York state law concerning surcharges against certain HMO's and health insurance companies did not refer to an ERISA plan. With respect to whether the New York law had a connection with an ERISA plan, the Supreme Court described the difficulty of using a literal definition of the term, "connection with." *Id.* at 656. Instead, the Supreme Court explained "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute." *Id.* Applying this analysis, the Supreme Court concluded that New York's law concerning surcharges for certain health care providers only indirectly related to insurance

policies and Congress could not have intended to preempt state laws typically subject to local regulation. *Id.* at 668.

C. In Addition To Justice Stevens, Justices Scalia, Ginsburg and Breyer Have All Criticized The Textualist Approach And Recommended Field And Conflict Preemption Analysis.

In *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, the United States Supreme Court continued to curtail the reach of the "relate to" clause of the ERISA preemption provision. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997). In that case, a contractor and subcontractor sought a declaratory judgment that certain portions of California's state prevailing wage law concerning apprentices were preempted by the National Labor Relations Act. *Id.* at 322. The United States Supreme Court determined that "like New York's surcharge requirement" in the case of *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, "the apprenticeship portion of the prevailing wage statute does not bind ERISA plans to anything." *Id.* at 332. The Supreme Court explained that "[t]he effect of the prevailing wage statute on ERISA-covered apprenticeship programs in California is substantially similar to the effect of New York law on ERISA plans choosing whether to provide health insurance incentives." *Id.* at 334. Accordingly, as the "prevailing wage statutes alters the incentives, but does not dictate the choices, facing ERISA plans," the Supreme Court determined

that the connection between the state law and ERISA was "so tenuous" such that it did "not have a 'connection with,' and therefore [did] not 'relate to,' ERISA plans." *Id.*

In his concurrence, Justice Scalia explained that while the opinion fairly depicts the prior legal precedent in the ERISA arena, it does not "bring clarity to this field--precisely because it does obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them has been abandoned." *Id.* at 334 (Scalia, J., concurring). In particular, Justice Scalia pointed to the misuse of the terms, "broad-scope,", "expansive sweep," "broadly worded," "deliberately expansive," and "conspicuous for its breadth," to describe the ERISA preemption provision and, more specifically its "relate to" clause. *Id.* Justice Scalia opined that "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Id.* at 335 (citations omitted).

Like Justice Stevens in the *District of Columbia* case, Justice Scalia urged the United States Supreme Court to acknowledge that it had incorrectly interpreted ERISA's preemption provision giving undue significance to the phrase "relate to" rather than applying traditional preemption law. *Id.* at 336 (emphasis original). Justice Scalia argued that under traditional preemption law, state law may be preempted in either of two ways. First, "[i]f Congress evidences an intent to occupy a given field [such as employee benefit plans], any state law falling within that field is preempted." *Silkwood v. Kerr-McGee*

Corp., 464 U.S. 238, 248 (1984), citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). Second, "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law...or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248. After laying out the traditional tests for federal preemption, Justice Scalia concluded his concurrence by stating simply, "[n]othing more mysterious than that; and except as establishing that, 'relates to' is irrelevant." *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. at 334. (Scalia, J., concurring).

During that same term, in *Boggs v. Boggs*, 520 U.S. 833, 841 (1997), the United States Supreme Court applied a conventional field/conflict preemption analysis to determine that Louisiana's community property law conflicted with ERISA's objectives and provisions. The Supreme Court stated, "[c]onventional conflict pre-emption principles require pre-emption 'where compliance with both federal and state regulations is a physical impossibility,...or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Boggs v. Boggs*, 520 U.S. at 844. Finding a conflict between the application of the Louisiana's community property law and the provisions of ERISA, the Supreme Court stated, "[w]e hold there is a

conflict, which suffices to resolve the case" without having to apply the 'relate to' analysis." *Id.* at 841.

In *De Buono v. NYSA-ILA*, 520 U.S. 806 (1997), also in the same term as *Dillingham* and *Boggs*, the Supreme Court again voiced its frustration with prior jurisprudence attempting to construe the phrase "relate to" in ERISA's preemption law. In *De Buono*, the Supreme Court decided to "go beyond the unhelpful text...and look instead to the objectives of the ERISA statute." *De Buono v. NYSA-ILA*, 520 U.S. at 813-814, quoting *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. at 656. In doing so, the Supreme Court employed a conventional conflict and field preemption analysis, concluding that New York state law taxing health care facilities did not conflict with any of ERISA's provisions. *Id.* Additionally, the Supreme Court explained that in enacting ERISA Congress did not intend to supersede such a law as the law does not require the provision of certain benefits or a certain method of calculation. *De Buono v. NYSA-ILA*, 520 U.S. at 814-815.

In *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000), the Supreme Court heralded back to its 1995 decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, as a turning point in its ERISA preemption jurisprudence by explaining that in that case it had decided that in a field of traditional state regulation there must be clear Congressional intent for ERISA to preempt state law.

The 2001 case of *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001), provided yet another instance where the

Supreme Court used ordinary conflict preemption principles to determine that a Washington State statute providing for revocation of a spouse as a designated beneficiary of nonprobate assets upon divorce. In that case, Donna Egelhoff was married to David Egelhoff until their divorce in 1994. *Id.* at 144. Two months later David died without a will in an automobile accident. *Id.* Prior to his death, David had neglected to change Donna as his designated beneficiary of his life insurance and pension plan. *Id.* By operation of state law, upon her divorce from David, Donna would have been removed as a beneficiary and David's life insurance and pension plan proceeds would flow to his children from a prior marriage. *Id.* Upon review, the United States Supreme Court determined that the revocation provision of the Washington state statute conflicted with ERISA's requirements that benefits be administered in accordance with plan documents. *Id.* at 148.

Aside from making an assertion that there was a conflict between the state statute and ERISA, the Supreme Court decision in *Egelhoff v. Egelhoff* reflects continued tension between the tests used to determine ERISA preemption. *Id.* The majority decision explained that to determine if a state law relates to an ERISA plan the court must determine whether the law connects with or refers to such a plan. *Id.* at 147, citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983). Acknowledging that the "connection with" part of such analysis is somewhat amorphous, the Supreme Court looked to the test set forth in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers* and echoed in *California Division of Labor Standards Enforcement v. Dillingham Construction.*

Id. Namely, the inquiry involves whether state law conflicts with a Congressional objective as well as the "nature of the effect of the state law on ERISA plans." *Id.* at 147. Here, the United States Supreme Court found a direct conflict between the state law and ERISA. *Id.* at 150.

In the concurrence, Justice Scalia, with whom Justice Ginsburg joined, reached the same result as the majority finding ERISA preemption but yet again assailing the validity of the "relate to" language as a guide to determining preemption. *Id.* at 152-153. (Scalia, J., concurring). Justice Scalia warned that a reading of the "relate to" provision that is "anything other than a reference to our established jurisprudence concerning conflict and field preemption has no discernible content that would not pick up every ripple in the pond, producing a result 'that no sensible person could have intended.'" *Id.* at 153 (Scalia, J. concurring), quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. at 336 (Scalia, J., concurring). Justice Scalia concluded by advocating ordinary preemption jurisprudence as the only logical means of interpreting the "relate to" clause. *Egelhoff v. Egelhoff*, 532 U.S. at 153.

Moreover, in the dissent in *Egelhoff*, Justice Breyer, with whom Justice Stevens joined, stated that he too believed that the court should apply ordinary conflict and field preemption to resolve issues of ERISA preemption. *Id.* The dissenters, nonetheless, opined there was no field or conflict preemption present in that case. *Id.* at 154. In the dissent, Justice Breyer stated that there was no direct conflict between

the state law and ERISA as the Washington law did not interfere with any federal objective. *Id.* Moreover, he determined that there was no field preemption as family property inheritance law is a field traditionally regulated by the state. *Id.*

D. In *Aetna Health v. Davila*, 542 U.S. 200, 209 (2004), The Supreme Court Determined That The Aggrieved Parties' Claims Duplicated, Supplemented or Supplanted An ERISA Civil Enforcement Remedy And, Therefore, Were Preempted by ERISA.

Most recently, in *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004), the United States Supreme Court based its determination of ERISA conflict preemption on whether the aggrieved party had a claim under Section 502(a) of ERISA. Section 502(a) of ERISA provides a cause of action against a plan fiduciary for breaches of fiduciary duty to the plan. Accordingly, if ERISA law itself provides a clear remedy for an aggrieved party under one of its own provisions, a state law cause of action covering the same injury or wrong is preempted. In its decision, the Supreme Court explained that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health, Inc. v. Davila*, 542 U.S. at 209. In other words, if the relief being sought is relief that would otherwise be available under the statutory scheme prescribed in ERISA then the claim is preempted by ERISA.

In *Aetna Health, Inc. v. Davila*, Davila, and another individual Calad, had lodged separate complaints against their health maintenance organizations ("HMOs"), Aetna and Cigna respectively, contending that the HMOs had violated their duty under the Texas Health Care Liability Act for failing to authorize treatment. *Aetna Health, Inc. v. Davila*, 542 U.S. at 200. Applying its reasoning to the facts, the United States Supreme Court stated that Davila's only complaint concerned Aetna's refusal to approve his VIOXX prescription. *Aetna Health, Inc. v. Davila*, 542 U.S. at 211. The "only relationship Aetna had with Davila was its partial administration of Davila's employer's benefit plan." *Id.* Similarly, Calad had filed a complaint against Cigna for refusing to cover her hospitalization costs for more than one day. *Id.* Just like Davila, Calad's only connection to Cigna was through its administration of Calad's health benefit plan. *Id.* Ultimately, the United States Supreme Court held that Davila and Calad's causes of action filed under Texas law were "brought to remedy only the denial of benefits under ERISA-regulated benefit plans" and, therefore, were completely preempted by ERISA. *Aetna Health, Inc. v. Davila*, 542 U.S. at 221.

Justice Ginsburg, with whom Justice Breyer joined, wrote a concurring opinion assailing the problem of an overly broad interpretation of ERISA preemption coupled with ERISA's weak statutory remedy which afforded only equitable relief, and not money damages, to an aggrieved party. *Id.* at 222. (Ginsburg, J., concurring). Ginsburg explained, that under ERISA "'[v]irtually all state law remedies are preempted but very few federal substitutes are provided.'" *Id.*

(citations omitted). Indeed, Section 502(a)(1)(B) provides:

> A civil action may be brought- (1) by a participant or beneficiary-...(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3) provides only for equitable relief. Section 502(a)(3) does not allow for an award of money damages against a non-fiduciary. *Aetna Health, Inc. v. Davila*, 542 U.S. at 223.

Another relevant factor to consider in determining whether ERISA preempts a state law claim is whether the claim involves an independent legal duty on the part of a defendant employer. *Aetna Health, Inc. v. Davila*, 542 U.S. at 210. The United States Supreme Court clarified its analysis by stating that if the claimant could have brought his claim under ERISA and "where there is no independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA, § 502(a)(1)(B)." *Id.* Applying its reasoning to the facts, the United States Supreme Court stated that Davila's only complaint concerned Aetna's refusal to approve his VIOXX prescription. *Aetna Health, Inc. v. Davila,* 542 U.S. at 211. The "only relationship Aetna had with Davila was its partial administration of Davila's employer's benefit plan." *Id.* Similarly, Calad had filed a complaint against Cigna for refusing to cover her hospitalization costs for more than one

day. *Id.* Just like Davila, Calad's only connection to Cigna was through its administration of Calad's health benefit plan. *Id.* Ultimately, the United States Supreme Court held that Davila and Calad's causes of action filed under Texas law were "brought to remedy only the denial of benefits under ERISA-regulated benefit plans" and, therefore, were completely preempted by ERISA. *Aetna Health, Inc. v. Davila*, 542 U.S. at 221.

II. The First Circuit Court of Appeals Relied Exclusively On The Textualist Approach And Did Not Use The Pragmatic Conflict and Field Preemption Analysis Called For By More Recent Supreme Court Decisions.

In the instant case, the First Circuit Court of Appeals relied on the textualist approach to ERISA preemption set forth in *Ingersoll-Rand,* 498 U.S. 133 (1990), namely, a state law is preempted if it "has a connection with or reference[s] an [employee benefit] plan." (App. 6a). The First Circuit acknowledged, however, that this Court has cautioned against a "literal reading of ERISA § 514(a)'s 'relate to' standard and that courts must look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." (App. 7a), citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers, Inc.*, 514 U.S. 645 (1995). Citing the *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers, Inc.* case, the First Circuit went on to identify the statute's objective as "providing a uniform national administration of ERISA plans and avoiding inconsistent state regulation of such plans" and, in an acknowledgement of this Court's developing

field/conflict approach to ERISA preemption, concluded that if a state law, among other things, mandated a particular employee benefit structure or its method of administration, *i.e.*, impinged on an area in which Congress intended to occupy the entire field, or gave rise to a cause of action that provided an alternative enforcement mechanism to ERISA's own enforcement scheme, *i.e.*, conflicted with Federal law, the state law was preempted. (App. 7a), citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. at 658-59. Importantly, however, the First Circuit ignored the analytical framework set out in *Aetna Health, Inc. v. Davila* for analyzing whether a state law conflicts with ERISA.

As described above, under the conflict analysis set forth in *Aetna Health, Inc. v. Davila*, courts must determine if a state law cause of action duplicates, supplements, or supplants the ERISA civil enforcement remedy. If the state law cause of action does, it conflicts with the clear Congressional intent to make the ERISA remedy exclusive and is therefore preempted. Instead of examining whether Zipperer's claims duplicate, supplement or supplant the ERISA civil enforcement remedy, the First Circuit simply reverted back to this Court's earlier "relates to" analysis.

Specifically, the First Circuit determined that Zipperer's claims were preempted because they related to the plan. The First Circuit concluded that Zipperer's claims could only be evaluated with respect to Raytheon's recordkeeping responsibilities for the plan and that such responsibilities were "part and parcel of Raytheon's plan administration." (App. 8a).

As such, the First Circuit concluded that Zipperer's claims "conflict[ed] with ERISA's proscription against state law 'mandat[ing] plan administration." Despite the First Circuit's use of the word "conflict," in reality, the First Circuit simply determined that Zipperer's claims "relate[d] to" Raytheon's ERISA plan. The First Circuit made no attempt to determine whether Massachusetts common law concerning negligence duplicated, supplemented or supplanted any remedy provided by ERISA's civil enforcement provision or impermissibly created an alternative enforcement scheme to ERISA's own recordkeeping and reporting requirements.

In fact, Zipperer's claims do not duplicate, supplement or supplant any remedy provided by ERISA's civil enforcement provision. Nor do they impermissibly create an alternative enforcement scheme to ERISA's own recordkeeping and reporting requirements.[2] Instead, Zipperer seeks a remedy completely unrelated to the relief available to claimants under ERISA and does so without relying on a state law that impermissibly creates an alternative enforcement scheme. Specifically, Zipperer is not seeking reinstatement of a pension benefit due him. In fact, Zipperer concedes he has no remedy under ERISA as he is currently receiving the pension benefit he is entitled to under Raytheon's plan. Rather Zipperer is seeking traditional "reliance" damages resulting from Raytheon's negligence in maintaining

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[2] Concededly, Zipperer's claims are undeveloped as the claims were dismissed on a motion to dismiss prior to the parties' conducting discovery.

his employment records with the company, its subsidiaries and affiliates. Zipperer does not claim that Raytheon's plan administrator, upon receipt of the correct information provided by Raytheon and its subsidiaries and affiliates, misinterpreted the data, entered the data incorrectly or incorrectly processed benefits due him. Nor is Zipperer arguing that the Raytheon Benefits Center did not comply with some particular method of recordkeeping mandated by state law. As a result of the negligence of Raytheon, its subsidiaries and affiliates, Zipperer received erroneous information from the Raytheon Benefits Center and he was reasonably induced to retire early from his job foregoing several more years of salary. For this wrong, ERISA provides no remedy.

Equally significant, unlike the plaintiffs in *Aetna v. Davila*, Zipperer did not lodge a complaint against an entity to which he was connected only through its administration of an ERISA regulated benefit plan. Each of Dedeaux's, Davila's and Calad's relationship to Aetna and Cigna respectively was through the individual company's benefit administration exclusively. Unlike Davila and Calad, Zipperer maintained an employment relationship with Raytheon and its subsidiaries. Such employment relationship imposed upon Raytheon and its subsidiaries independent duties and responsibilities, apart from any duty it may have had with respect to an ERISA regulated plan. Borrowing the United States Supreme Court's language, Raytheon, as Zipperer's employer, had an "independent legal duty" to accurately maintain his personnel information and communicate it effectively to any and all interested parties, not just its pension plan administrator. *Aetna*

Health, Inc. v. Davila, 542 U.S. at 210. Zipperer's complaint concerns Raytheon's breach of that independent legal duty.

For its own reasons[3], Raytheon employed Zipperer and others in a complicated system of subsidiaries and affiliates. Zipperer claims that Raytheon Company itself – not its pension benefits administrator – negligently failed to keep accurate records concerning Zipperer's dates of service with respect to the company, its affiliates and subsidiaries. Zipperer contends that Raytheon was obliged to keep accurate records of his dates of services not only because sound business practices commend it but also because the Massachusetts Personnel Records law requires such record keeping. Massachusetts General Laws Chapter 149, Section 52C requires an employer to keep personnel records concerning an employee including, "rate of pay and any other compensation paid to employee..starting date of employment...copies of dated termination notices." Mass.Gen. L. ch. 149, § 52C. Raytheon's obligation to keep such records existed long before the enactment of ERISA and will continue to exist independently of ERISA. State laws governing recordkeeping in the context of employment should not run afoul of ERISA's simply because those state laws address recordkeeping functions that, as a matter of necessity, arise in the administration of a particular pension plan. Raytheon, by simply

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[3] Presumably, Raytheon wished to insulate itself from potential liability arising from Raytheon Services Nevada's work with nuclear materials by creating a subsidiary and assigning its employees to work there.

inserting recordkeeping requirements in its pension plan should not be able to effectively immunize itself from state law claims for negligence with regard to the same.

Respondent cannot demonstrate that a state law requirement that it keep its employment records accurately has any impact on the administration of its pension plan, nor can it demonstrate that its pension plan would be adversely affected by Raytheon Company paying Zipperer compensatory damages unrelated to any pension benefit. Nor would a court be required to refer to Raytheon's plan to determine whether a breach of duty occurred or to calculate damages. In solving the ERISA preemption puzzle, courts should use traditional field and conflict preemption principles. Because Zipperer's state law claims against Raytheon do not impinge upon the field Congress intended to occupy and because Zipperer's state law claims do not conflict with any remedy provided by ERISA, Zipperer's state law claims are not preempted.

CONCLUSION

The foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

EMORY ZIPPERER
Petitioner,

By his attorneys,

THERESA FINN DEVER
JOSEPH P. DEVER
FREDERICK W. RILEY
Counsel of Record
RILEY & DEVER, P.C.
LYNNFIELD WOODS OFFICE PARK
210 BROADWAY, SUITE 101
LYNNFIELD, MA 01940-2351
TELEPHONE: (781) 581-9880

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 06-2493

[Decided July 12, 2007]

EMORY ZIPPERER,
Plaintiff, Appellant,

v.

RAYTHEON COMPANY, INC.,
Defendant, Appellee.

Before LYNCH, Circuit Judge, CYR, Senior Circuit Judge, and HOWARD, Circuit Judge.

HOWARD, Circuit Judge.

In this appeal, Plaintiff Emory Zipperer seeks reversal of the district court's grant of judgment on the pleadings in favor of his former employer, Raytheon Company, Inc. ("Raytheon"). Zipperer asserted Massachusetts state law claims of negligence, equitable estoppel and negligent misrepresentation against Raytheon after Raytheon provided him with an erroneous estimate of his retirement benefits which, he claims, led to his voluntary early retirement. The

district court, essentially adopting a magistrate judge's report and recommendation, ruled that Zipperer's claims are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. We affirm.

I. FACTUAL BACKGROUND

We state the facts as pleaded in the complaint. *See Mass. Nurses Ass'n v. N. Adams State Reg'l Hosp.*, 467 F.3d 27, 31 (1st Cir. 2006). In November 1972, Zipperer began working for United Engineers & Constructors, Inc. ("UEC"), a Raytheon subsidiary, as a field engineer in UEC's nuclear power division. Zipperer began participating in the UEC retirement plan in January 1975.

At Raytheon's request, in November 1990 Zipperer began working for another Raytheon subsidiary, Raytheon Services, Nevada ("RSN"), a specialty company used by Raytheon solely for the purpose of administering work for the United States Department of Energy ("DOE"). While working at RSN, Zipperer remained a Raytheon employee, and no funds were transferred from the UEC retirement plan to the RSN pension plan. However, the Raytheon Benefit Center, which administered both plans, adjusted Zipperer's service date for the RSN plan to reflect his previous service at UEC.

Zipperer's employment at RSN ended in October 1993. The next month, Zipperer began working for Raytheon Engineers & Constructors, ("REC"), a successor to UEC. Upon his hiring, although no trust funds were transferred, REC credited Zipperer for his

prior years of service with UEC for purposes of calculating his pension benefits. As with the Raytheon-affiliated UEC and RSN plans, the REC benefit plan was also administered by the Raytheon Benefit Center. On December 30, 1995, according to the Raytheon Benefit Center, RSN's pension trust funds were transferred to the Bechtel Nevada Employee Retirement Plan when Bechtel Nevada replaced RSN as a DOE contractor. Neither Raytheon nor RSN notified Zipperer's then-current employer, REC, that the RSN trust fund monies attributable to Zipperer's vested RSN benefit, which also included his prior service at UEC, had been transferred to Bechtel. None of the Raytheon pension plans was amended to reflect the transfer. Thus, when REC was purchased by Washington Group International ("WGI") in July 2000, Raytheon calculated an overstated benefit amount attributable to Zipperer, erroneously including amounts attributable to his original UEC service, which had already been subsumed into the RSN plan eventually transferred to Bechtel. In other words, both Bechtel and Raytheon were including Zipperer's original UEC service time in their respective pension calculations.

In late 1999, at age 55, Zipperer requested from REC an estimate of his pension benefit, noting his prior service with UEC and "Raytheon Company(s)." According to the benefit computation subsequently provided to him by REC, Zipperer could expect to receive a monthly benefit of $1,100.17 if he chose a single life annuity with no right of survivorship, $1,063.11 if he chose a ten year "certain and continuous option," and $980.55 if he chose a joint and survivor annuity. Basing their decision on the benefit

estimate provided by Raytheon, Zipperer and his wife decided to retire, shortly after the sale of REC to WGI. At the time of his retirement, in September 2000, Zipperer was 56 years old and was earning $107,484 annually as a Project Control Manager.

Zipperer, who chose the joint and survivor annuity, subsequently began receiving monthly pension payments from Raytheon of $840.64, approximately $140 less than the previous estimate. In June 2001, the Raytheon Benefit Center advised Zipperer in writing that his pension benefits had been overstated and that he was entitled to a monthly benefit of only $400.06. Zipperer, who concedes that he is currently receiving a pension from Bechtel, the amount of which takes into consideration his service time at RSN and UEC, was unsuccessful in his internal appeals of the benefit determination. After exhausting the internal appeals process, Zipperer filed a complaint against Raytheon in Massachusetts Superior Court alleging negligence, equitable estoppel and negligent misrepresentation. Raytheon timely removed the case to federal court, and subsequently moved for judgment on the pleadings on the ground that Zipperer's claims were preempted by ERISA. After a hearing, a magistrate judge recommended allowing the motion. The magistrate judge concluded that:

> Allowing a cause of action to proceed for the negligence in making the representation or the negligence in maintaining and transferring the pertinent records amounts to an alternative enforcement mechanism to enforce (or estop the employer from denying) extra-contractual benefits. Such claims inevitably and directly

> conflict with the carefully chosen and carefully limited remedies provided under ERISA. . . . Regardless of the label of the state law claims, in essence they seek extra-contractual benefits not authorized by the terms of the Plan. Such an end run around the carefully crafted benefits Raytheon chose to provide amounts to an attempt to authorize remedies beyond those provided by the Plan.

Report and Recommendation at 10.

Zipperer objected to the magistrate judge's recommendation, *see* Fed. R. Civ. P. 72, but the district court adopted the recommendations in all material respects.[1] This appeal followed.

II. DISCUSSION

We review de novo the district court's grant of judgment on the pleadings. *Mass. Nurses Ass'n,* 467 F.3d at 31. We view the facts contained in the pleadings in the light most favorable to the nonmovant and draw all reasonable inferences in his favor. *Aponte-Torres v. Univ. of P.R.,* 445 F.3d 50, 54 (1st Cir. 2006). Judgment on the pleadings is proper "only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment." *Id.*

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[1] Both the magistrate judge and the district court provided Zipperer with opportunities to amend his Complaint. He did not accept either invitation.

Zipperer advances several theories on appeal. First, he argues that his claims do not relate to Raytheon's retirement plan, and do not duplicate, supplement or supplant ERISA's civil enforcement provisions. Instead, he says, his claims relate only to Raytheon's "independent legal obligation" to keep proper records. He further argues that his claims do not relate to the retirement plan, because he is seeking only negligence damages and not reinstatement of promised benefits. Finally, Zipperer maintains that even if preemption would otherwise be appropriate, the district court erroneously concluded that Raytheon was acting as "an ERISA employer" during the relevant time period.

Our analysis begins with § 514 of ERISA, which provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .[2] 229 U.S.C. § 1144(a). "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). A law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)). A state law can be considered "related to" a benefit plan–and thus preempted–"even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Id.*

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[2] There is no dispute that the Plan at issue in this case is an "employee benefit plan," within the meaning of ERISA.

(quoting *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 47, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)).

While ERISA's preemption is not boundless, it is far reaching. In determining the reach of ERISA preemption, the Supreme Court has cautioned against a literal reading of ERISA § 514(a)'s "relate to" standard, and ruled that courts must " 'look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.'" *Hampers v. W.R. Grace & Co.,* 202 F.3d 44, 51 (1st Cir. 2000) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995)). ERISA's objectives include providing a "uniform national administration of ERISA plans" and avoiding inconsistent state regulation of such plans. *Danca v. Private Health Care Sys., Inc.,* 185 F.3d 1, 7 (1st Cir. 1999) (citing *Travelers,* 514 U.S. at 656-58, 115 S. Ct. 1671). Three categories of state regulation that have been identified as conflicting with these objectives are: 1) those that mandate employee benefit structures or their administration; 2) those that bind plan administrators to a particular choice; and 3) causes of action that provide alternative enforcement mechanisms to ERISA's own enforcement scheme. *Travelers,* 514 U.S. at 658-59, 115 S. Ct. 1671; *Hampers,* 202 F.3d at 44. Looking to the real nature of the plaintiff's claims, regardless of how they are characterized in his complaint, *Hampers,* 202 F.3d at 51, we conclude that the first and third categories of conflicting state regulation are implicated here.

As mentioned, Zipperer first argues that his suit does not relate to Raytheon's retirement plan, and

does not duplicate, supplement or supplant ERISA's civil enforcement provisions. We disagree. The complaint's three counts rely on the common claim that Raytheon's negligent recordkeeping led to his reliance on an erroneous estimate of his retirement benefits. In our view, even a narrow reading of section 514(a)'s "related to" provision yields a conclusion that Zipperer's claims are preempted, and that is because the claims can only be evaluated with respect to Raytheon's recordkeeping responsibilities for the plan. Such responsibilities were part and parcel of Raytheon's plan administration. Subjecting Raytheon's plan administration to the state law scrutiny Zipperer seeks would conflict with ERISA's proscription against state law "mandat[ing] plan administration" and would also impermissibly create "an alternative enforcement scheme" to ERISA's own recordkeeping and reporting requirements. *Travelers,* 514 U.S. at 658-59, 115 S. Ct. 1671; *Hampers,* 202 F.3d at 51. Moreover, allowing a claim to proceed under Massachusetts law would inexorably–and impermissibly–lead to inconsistent state regulations, as state courts "develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds" with ERISA's goal of uniformity. *McClendon,* 498 U.S. at 142, 111 S. Ct. 478.

If we had any doubt about whether Zipperer's claims are preempted, we note that we faced a nearly identical situation in *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790 (1st Cir. 1995). There, the plaintiff filed state law misrepresentation claims against his

employer after he accepted an early retirement offer which, it turns out, was based on inaccurate information provided by the employer. *Id.* at 792. We affirmed the dismissal of the complaint on preemption grounds, noting that an analysis of plaintiff's claims would "ultimately depend on an analysis" of the ERISA plan at issue, to which the claims were thus "inseparably connected." *Id.* at 795. Similarly, Zipperer's claims are "inseparably connected" to the Raytheon plan and its administration. *See also Degnan v. Publicker Indus., Inc.*, 83 F.3d 27 (1st Cir. 1996) (affirming dismissal, on preemption grounds, of plaintiff's state law misrepresentation claims against a former employer who allegedly reneged on certain promises it made regarding plaintiff's retirement benefits).

Also instructive is *Danca*. In that case, the plaintiff and her family members sued an ERISA health insurer and utilization review firm for alleged negligence in the course of treatment precertification. *Danca*, 185 F.3d at 2. We affirmed the dismissal of claims based on negligent supervision and training of precertification personnel because such claims would "indisputably create a threat of conflicting and inconsistent state and local regulation of the administration of ERISA plans." *Id.* at 7. Our decision in *Danca* reflected the concern that "[d]ifferent states could apply different standards for what constitutes a negligent precertification training or practice," a result ERISA's preemption clause was designed to avoid. *Id.*

Our concern here is no different. As we see it, Zipperer is asking that Massachusetts state law obligations be engrafted onto ERISA. Such claims, if

allowed, would lead to the "different administrative procedures in different jurisdictions" that ERISA is designed to avoid. As such, they are preempted. The fact that Zipperer is seeking negligence damages and not reinstatement of benefits does not alter this result, as any determination of negligence, in the present context, necessarily "relates to" the ERISA plan.

Zipperer also argues that it is unclear from the complaint whether Raytheon is either an ERISA employer or plan administrator, and thus whether it is entitled to preemption. We disagree. In our view the district court correctly concluded that Zipperer's claims only exist by virtue of Raytheon's status as an ERISA employer and its administration of the ERISA plan at issue. *Hampers,* 202 F.3d at 53.

We have reviewed the other issues Zipperer raised, and find them without merit.

III. CONCLUSION

We conclude that Zipperer's claims for negligence, equitable estoppel and negligent misrepresentation are preempted by ERISA.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 03-12379-MLW

[Decided March 30, 2006]

EMORY ZIPPERER)
Plaintiff,)
)
v.)
)
RAYTHEON COMPANY, INC.,)
Defendant.)
)

MEMORANDUM AND ORDER

WOLF, D.J.

The court has considered the attached July 6, 2005 Report and Recommendation of the Magistrate Judge, the plaintiff's objections to it, and the defendant's reply and objection. With one exception explained below, the Report and Recommendation is well-reasoned and hereby adopted.

As the magistrate judge correctly explained, the First Circuit's decisions in *Carlo v. Reed Rolled Thread*

Die Co., 49 F.3d 790 (1st Cir. 1995) and *Degnan v. Publicker Indus., Inc.*, 83 F.3d 27 (1st Cir. 1996) are directly on point. ERISA preempts the plaintiff's state-law claims.

The plaintiff is incorrect to rely on *Miara v. First AllAmerica Financial Life Ins. Co.*, 379 F. Supp. 2d 20 (D. Mass. 2005). In *Miara*, the court noted that "this case involves a suit against insurance agents and insurance companies, not employers, underwriters, or fiduciaries" of an ERISA plan. *Id.* at 47. Therefore, it declined to apply, *Carlo* and *Degnan*. In contrast, the instant case involves plaintiff Emory Zipperer's employer, who was in charge of the ERISA plan. Therefore, *Carlo* and *Degnan* apply.

One of the plaintiff's objections is meritorious, however. The plaintiff asserts that the Report and Recommendation mis-states his claim when it says, "It is only by virtue of the Raytheon Benefit Center's February 2000 calculation and its administration of the Plan that Zipperer maintains there was a misrepresentation." Rep. & Rec. at 10. According to Zipperer, his complaint "does not state that the Raytheon Benefit Center miscalculated his benefits but rather calculated his benefits based upon erroneous information given it by Raytheon Company." Pl. Obj. at 2.

Zipperer is correct that the magistrate judge misstated this aspect of claim. The magistrate judge should have stated that "it is only by virtue of [Raytheon's] status as an ERISA employer with . . . control over the administration and operation of" the employee benefits plan that the plaintiff is claiming a

misrepresentation. *Hampers v. W.R. Grace & Co., Inc.*, 202 F.3d 44, 53 (1st Cir. 2000). Nevertheless, this minor misstatement is not material to the magistrate judge's otherwise well-reasoned analysis.

Accordingly, it is hereby ORDERED that:

1. The defendants' Motion for judgment on the pleadings (Docket No. 17) is ALLOWED. However, the plaintiff is granted leave to amend his complaint, if he can consistent with Federal Rule of Civil Procedure 11 state a claim on which relief can be granted.

2. The plaintiff shall file any amended complaint by April 28, 2006.

3. The defendant shall answer or file a motion to dismiss any amended complaint by May 30, 2006.

/s/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 03-12379-MLW

[Decided July 6, 2005]

EMORY ZIPPERER,)
Plaintiff,)
)
v.)
)
RAYTHEON COMPANY, INC.,)
Defendant.)
)

REPORT AND RECOMMENDATION RE: DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS (DOCKET ENTRY # 17)

BOWLER, U.S.M.J.

Pending before this court is a motion for judgment on the pleadings filed by defendant Raytheon Company, Inc. ("Raytheon") under Rule 12(c), Fed. R. Civ. P. ("Rule 12(c)"). (Docket Entry # 17). Plaintiff Emory Zipperer ("Zipperer"), a retired Raytheon employee, opposes the motion. (Docket Entry # 20).

After conducting a hearing, this court took the motion (Docket Entry # 17) under advisement.

PROCEDURAL BACKGROUND

Plaintiff originally filed this action in the Massachusetts Superior Court Department (Middlesex County). Thereafter, Raytheon filed a timely notice removing this case to the United States District Court for the District of Massachusetts.

Zipperer's three count complaint seeks redress against Raytheon stemming from an incorrect estimate of expected retirement income that Zipperer would receive under The Raytheon Engineers and Constructors, Inc. Retirement Plan ("the Plan"). Relying on the estimate of expected retirement income, Zipperer and his wife Mary Zipperer, chose to retire. The estimate proved erroneous.

The complaint alleges causes of action under state law for negligence (Count I), equitable estoppel (Count II) and negligent misrepresentation (Count III). Raytheon submits that the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), preempts all three causes of action.

STANDARD OF REVIEW

In reviewing the pleadings, this court accepts "all of the non-moving party's well-pleaded factual averments as true and draws all reasonable inferences in [its] favor." *Feliciano v. State of Rhode Island*, 160 F.3d 780, 788 (1st Cir. 1998). Judgment on the pleadings is not permissible "unless it appears beyond

a doubt that the nonmoving party can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Feliciano v. State of Rhode Island*, 160 F.3d at 788; *accord Santiago v. Morales Medina*, 943 F.2d 129, 130 (1st Cir. 1991). "Thus, under Rule 12(c), courts need not credit conclusory statements or merely subjective characterizations, but rather plaintiffs must set forth in their complaint specific, nonconclusory factual allegations regarding each material element necessary to sustain recovery." *Class v. Commonwealth of Puerto Rico*, 309 F. Supp. 2d 235, 236 (D.P.R. 2004).

Rule 12(c), however, only permits a judgment based on the pleadings. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998). "Pleadings" includes the complaint, the answer and "any written instruments attached as exhibits." *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d at 452. With few exceptions, consideration of other documents is improper absent conversion of the Rule 12(c) motion into a motion for summary judgment. As central documents referred to in the complaint, the Plan as well as the December 27, 1999 request for retirement calculations (Docket Entry # 1, ¶ 17) fall within these limited exceptions.[1] *See Alternative Energy v. St. Paul*

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[1] The complaint does not refer to an October 6, 2000 estimate of benefits which Raytheon attaches to an affidavit in support of the Rule 12(c) motion. Inasmuch as the document is not central to the complaint and does not otherwise fall within the reach of an exception, it is not considered. *See, e.g., Pledger v. North Carolina Department of Health and Human Services*, 7 F. Supp. 2d 705, 707-708 (E.D.N.C. 1998) (refusing to consider documents attached

Fire and Marine, 267 F.3d 30, 33-34 (1st Cir. 2001) (setting forth exceptions). Applying this standard, the facts are as follows.

FACTUAL BACKGROUND

On November 20, 1972, Zipperer began working for United Engineers & Constructors, Inc. ("UE & C"), a wholly owned subsidiary of Raytheon, as a field engineer in the nuclear power division. On January 1, 1975, Zipperer began participating in UE & C's retirement plan.

On November 2, 1990, Zipperer began working at another Raytheon subsidiary, Raytheon Services, Nevada ("RSN"). Raytheon created RSN solely for the purpose of administering work for the United States Department of Energy ("DOE"), Nevada Operations. At RSN, Zipperer participated in atomic testing and chemical weapons disposal programs. Zipperer, however, remained a Raytheon employee and no monies were transferred from the UE & C retirement plan to the RSN pension plan. The Raytheon Benefit Center administered both plans and adjusted Zipperer's service date for the RSN pension plan to reflect and include his prior service at UE & C.

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to memorandum in the course of ruling on a Rule 12(c) motion). It is also improper to consider paragraph eight of the affidavit of Evans W. Cheeseman, Jr., wherein he asseverates that "Zipperer is currently receiving the correct amount of pension benefits due to him under the [Plan]." (Docket Entry # 20, Att. 2).

On October 4, 1993, Zipperer separated from his employment at RSN. On November 29, 1993, Raytheon Engineers & Constructors, Inc. ("RE & C"), a successor to UE & C, hired Zipperer. RE & C credited Zipperer with his prior years of service at UE & C for the purpose of calculating his pension benefits.

On December 30, 1995, Bechtel Nevada replaced RSN as a contractor for the DOE. As of that date, RSN's pension trust funds were transferred to the Bechtel Nevada Employee Retirement Plan, according to the Raytheon Benefit Center. Raytheon and RSN did not notify RE & C that Zipperer's vested RSN benefit, which included the prior UE & C benefit, was being transferred to Bechtel Nevada. None of the Raytheon pension plans was amended to reflect the transfer of assets to Bechtel Nevada. Consequently, Raytheon reported this overstated and incorrect benefit to Washington Group International ("WGI"), the company that later purchased RE & C in July 2000.

On December 27, 1999, Zipperer completed a request for retirement calculations and submitted it to RE & C's pension administration department. The one page form states in large type, "If you would like calculations showing your estimated retirement income from our Retirement Plan, please complete this form." (Docket Entry # 20, Att. 2, Ex. B). Zipperer checked the spaces regarding "Prior Service" applicable to UE & C and "Raytheon Company(s)" and requested calculations of his retirement income for the estimated retirement dates of April 1, 2000, and April 1, 2001. (Docket Entry # 20, Att. 2, Ex. B).

On February 16, 2000, RE & C printed out and sent Zipperer a computation of retirement benefits. The computation noted that Zipperer could expect to receive a monthly benefit of $1,100.17 if he chose the single life annuity option with no rights of survivorship, a monthly benefit of $1,063.11 if he chose the ten year certain and continuous option and a monthly benefit of $980.55 if he chose the joint and survivor annuity option.

On July 7, 2000, RE & C was sold to WGI. Relying upon the February 16, 2000 information from the RE & C Pension Administrator, Zipperer, as well as his wife, decided to retire. On September 30, 2000, Zipperer retired from WGI at the age of 56. At the time, he earned an annual salary of $107,484 as Project Controls Manager for WGI.

Shortly after retiring, Zipperer began receiving monthly retirement checks from Raytheon in the amount of only $840.64. In June 2001, the Raytheon Benefit Center advised Zipperer by letter that his pension benefits had been overstated and that he was entitled to receive a monthly benefit of only $400.06. Zipperer appealed the decision internally without avail and has exhausted internal appeal procedures.

The Plan provides retirement and disability retirement benefits to eligible Raytheon employees. It is administered by a Retirement Committee consisting of at least three individuals appointed by the Board of Directors of RE & C. The committee serves "at the pleasure of the Directors." (Docket Entry # 20, Att. 2, Ex. A, ¶ 5.2). Under the terms of the Plan:

> The Committee shall interpret [the] Plan and the meaning and intent of all terms and provisions hereof, shall remedy any ambiguities or omissions therein, and shall determine any and all questions arising in the application of the provisions of the Plan in such manner and upon such basis as the Committee shall in its absolute discretion deem to be proper and fair and equitable under the circumstances. The Committee shall exercise such authority and responsibility as it deems appropriate in order to comply with ERISA. The Committee's interpretations and determinations made in good faith shall be conclusive and binding on all parties except as otherwise determined by the Directors.

(Docket Entry # 20, Att. 2, Ex. A, ¶ 5.5). The terms of the Plan also require the Committee to "keep appropriate records of the operation of the Plan." (Docket Entry # 20, Att. 2, Ex. A, ¶ 5.3).

Inasmuch as the Rule 12(c) motion asserts that ERISA preempts each cause of action, it is worth examining the substantive allegations of each of the three counts in the complaint. In Count I, Zipperer alleges that Raytheon breached its duty "to properly maintain records and information concerning his retirement plan." (Docket Entry # 1, ¶ 27). The count additionally complains of Raytheon's failure to maintain proper employment records. As a result, the Raytheon Benefit Center furnished Zipperer "with incorrect information concerning the amount of his monthly retirement benefits." (Docket Entry # 1, ¶ 30). The count further alleges that Zipperer suffered

damages in the form of "lost wages" and "lost benefits." (Docket Entry # 1, ¶ 32).

In Count II, the complaint alleges that Zipperer relied on the incorrect information "concerning the amount of Zipperer's monthly pension benefits" to his detriment by giving up his job as well as his home and deciding to travel.[2] (Docket Entry # 1, ¶¶ 35 & 37). In Count III, Zipperer complains that Raytheon did not exercise reasonable care in providing the information to him "concerning the amount of his pension benefit upon retirement." (Docket Entry # 1, ¶ 41). Zipperer then reasonably relied upon the false information and, as a result of the negligent misrepresentation, Zipperer "suffered damage including his present lost wages, lost benefits, future income and attorneys' fees and costs." (Docket Entry # 1, ¶ 44).

DISCUSSION

Section 514(a) of ERISA broadly and expansively provides that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a); *accord Hotz v. Blue Cross and Blue Shield of Massachusetts*, 292 F.3d 57, 60 (1st Cir. 2002) (section 1144(a) "has been applied widely to bar state claims seeking damages for alleged breach of obligations pertaining to an ERISA plan"); *Mauser v. Raytheon Company Pension Plan for Salaried Employees*, 239

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[2] Elsewhere, the complaint states that Zipperer, as well as his wife, decided "to retire, purchase a motor coach and travel throughout the United States." (Docket Entry # 1, ¶ 20).

F.3d 51, 57 (1st Cir. 2001) (describing section 514(a) as "expansive"). As interpreted by the Supreme Court, a state law "relates to" an employee benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan."[3] *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 (1983). Because of the "unworkability of a literal reading" of the "'relate to' standard," courts should look "to the objectives of the ERISA statute as a guide" in measuring the scope of preemption. *Hampers v. W.R. Grace & Company, Inc.*, 202 F.3d 44, 51 (1st Cir. 2000) (citing *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 656-58 (1995)); *New Hampshire Motor Transport Association v. Rowe*, 2005 WL 1319540 at *5 n. 59 (D. Me. May 27, 2005) ("courts should consider the objectives of the ERISA statute rather than look to 'infinite relations' or 'infinite connections' to measure preemption").

ERISA's objectives include the goal of providing a "uniform national administration of ERISA plans" and avoiding inconsistent state regulation of such plans. *Danca v. Private Health Care Systems, Inc.*, 185 F.3d 1, 7 (1st Cir. 1999). Here, the conduct at issue in the state causes of actions involves a calculation, albeit erroneous, of retirement benefits under an ERISA plan. Allowing a cause of action to proceed for the negligence in making the representation or the negligence in maintaining and transferring the pertinent records amounts to an alternative

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[3] The parties correctly do not dispute that the Plan is an employee pension benefit plan within the meaning of ERISA. *See* 29 U.S.C. § 1002(2)(A).

enforcement mechanism to enforce (or estop the employer from denying) extra-contractual benefits. Such claims inevitably and directly conflict with the carefully chosen and carefully limited remedies provided under ERISA. *See Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488, 2499 & n. 4 (2004) ("limited remedies available under ERISA are an inherent part of the 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans"); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54 (1987).

Regardless of the label of the state law claims, in essence they seek extra-contractual benefits not authorized by the terms of the Plan. Such an end run around the carefully crafted benefits Raytheon chose to provide and fund amounts to an attempt to authorize remedies beyond those provided by the Plan. *See generally Aetna Health, Inc. v. Davila*, 124 S. Ct. at 2498-2499; *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d 790, 794 n. 3 (1st Cir. 1995).

The fact that neither party disputes the terms of the Plan does not preclude a finding of preemption. It is only by virtue of the Raytheon Benefit Center's February 2000 calculation and its administration of the Plan that Zipperer maintains there was a misrepresentation. *See Hampers v. W.R. Grace & Company, Inc.*, 202 F.3d at 53 (finding preemption and reasoning that "it is only by virtue of Grace's status as an ERISA employer with direct control over the administration and operation of the NMC SERP that Grace could have breached the 1991 Agreement in the way Hampers insists that it did"); *see also Aetna*

Health, Inc. v. Davila, 124 S. Ct. at 2496 (although discussing complete preemption in the context of jurisdiction, nonetheless noting that "the only relationship Aetna had with Davila was its partial administration of Davila's employer's benefit plan").

Finally, whether framed as seeking or not seeking damages for lost benefits or as seeking damages only in the form of present lost wages for the employment Zipperer relinquished in reliance on the misrepresentation, the conduct at issue has a "connection with" the ERISA Plan and inevitably relates to the Plan. Simply put, it involves an erroneous calculation of future retirement benefits under an ERISA plan which the terms of the Plan apparently do not encompass. Section 514(a) of ERISA preempts the state law claims even if ERISA's enforcement mechanisms do not provide the remedy Zipperer seeks of present lost wages. *See generally Pilot Life Insurance Company v. Dedeaux*, 481 U.S. at 54-55.

If there was any doubt regarding the preemption of all three of the state law causes of action, First Circuit law forecloses any such doubt. Where, as here, the plaintiff attempts to craft state law causes of action for erroneous statements regarding expected future retirement benefits under an ERISA plan, two First Circuit decisions uniformly conclude that section 514(a) precludes the state law claims concerning the misrepresentations about the plan. *See Degnan v. Publicker Industries, Inc.*, 83 F.3d 27 (1st Cir. 1996) (affirming dismissal of common law misrepresentation claim as preempted where claim alleged that employer induced the plaintiff to retire by promising to revise

retirement plan to make the plaintiff eligible and then reneging on the promise after three years); *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d 790 (1st Cir. 1995) (affirming Rule 12(b)(6) dismissal of state law claims, including negligent misrepresentation, as preempted where the employer erroneously certified monthly retirement benefits that later proved incorrect under terms of the plan). Indeed, the personnel manager in *Carlo* indicated that the expected monthly "figures had been certified," *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d at 792, whereas the monthly retirement figures provided to Zipperer were only "estimated retirement income" (Docket Entry # 20, Att. 2, Ex. B).[4] Like Zipperer, Carlo relied on the statement regarding expected future benefits and opted for early retirement. Although the decision left Carlo without a remedy, the First Circuit concluded that the claims related to an employee benefit plan. *Carlo* and *Degnan* are directly on point and mandate a finding of preemption for the three state law causes of action.

Given the foregoing First Circuit law, Zipperer's reliance on a district court decision in the Eastern District of Michigan, *Morningstar v. Meijer, Inc.*, 662 F. Supp. 555 (E.D. Mich. 1987), and a 1989 district court decision in this district that predates both *Carlo* and *Degnan*, *Cuoco v. Nynex, Inc.*, 722 F. Supp. 884 (D. Mass. 1989), is misplaced. In any event, neither case is factually on point. *Morningstar* is distinguishable on

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[4] That said, this court's recommendation to allow the motion (Docket Entry # 17) would remain the same even if this court considered the estimate a certification of benefits.

the basis that it involved the breach of an employment contract, an allegation absent from the case at bar. *Cuoco* involved a series of promises as opposed to the single estimate at issue in this action. It also involved a dispute over coverage under an ERISA plan for a divorced spouse of a former employee as opposed to a miscalculation of retirement benefits owed to a covered individual. In contrast, Zipperer is entitled to benefits under the plan and seeks remedies grounded on a promise for additional benefits. There is, therefore, a far closer "'closer connection with,'" *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d at 793, an ERISA plan than the connection at issue in *Cuoco*.

Furthermore, a number of courts outside the First Circuit consider breach of contract claims based upon erroneous statements regarding future retirement benefits preempted. *See Dranchuk v. Akzo Nobel, Inc.*, 88 F.3d 457, 459-460 (7th Cir. 1996) (breach of contract claim regarding letter agreements promising extra pension credits in the event of early retirement preempted); *Anderson v. John Morrell and Company*, 830 F.2d 872 (8th Cir. 1987) (breach of contract claim regarding extracontractual plan benefits preempted).

As a final matter, Raytheon's motion seeks to deny Zipperer the opportunity to reframe the complaint as an action under ERISA and/or its evolving equitable estoppel doctrine. The request is premature. Zipperer has not yet attempted to reframe the complaint as alleging a cause of action under ERISA. Although Zipperer faces a difficult task, *see Slice v. Sons of Norway*, 34 F.3d 630 (8th Cir. 1994) (rejecting similar claims), this court lacks the benefit of examining such a complaint. Thus, like the opportunity afforded by the

court in *Degnan* and for similar reasons,[5] this court will allow Zipperer a limited opportunity to seek leave to file an amended complaint raising one or more causes of action under ERISA, if he so chooses.

CONCLUSION

In accordance with the foregoing discussion, this court **RECOMMENDS**[6] that the motion for judgment on the pleadings (Docket Entry # 17) be **ALLOWED** with the caveat of allowing Zipperer 30 days from the date of this opinion to file a motion for leave to file an

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[5] As explained by the court in *Degnan*,

> At this juncture, we simply cannot tell. Because the plaintiff has not yet tried to plead [an ERISA claim], we do not know how well the shoe fits, or if it fits at all. Rather than guessing at what facts the plaintiff conceivably could allege in an amended complaint, we think that the course of prudence is to give the plaintiff an opportunity to supplement his factual allegations with whatever additional averments he believes would buttress [such an ERISA claim].

Degnan v. Publicker Industries, Inc., 83 F.3d at 30.

[6] Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order. *United States v. Escoboza Vega*, 678 F.2d 378-379 (1st Cir. 1982); *United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986).

amended complaint raising one or more causes of action under ERISA.

/s/Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge